In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 115

ADELE WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (R. 11) and that court's supplemental opinion (R. 17) are reported at 92 F. Supp. 322, 325. The opinion of the Court of Appeals for the Second Circuit (R. 41) is reported at 187 F. 2d 610.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1951 (R. 46). The time for fil-

ing the petition for a writ of certiorari was extended by order of Mr. Justice Jackson to August 2, 1951. The petition was filed on June 13, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

A veteran, while in service, took out two policies of level premium term National Service Life Insurance. He paid no premiums on that insurance after March 31, 1947. He died about 17 months later, on August 27, 1948. At the time of his death, no dividends had been declared on National Service Life Insurance policies by the Veterans Administration. Subsequently, the Veterans Administration declared a special dividend, the veteran's share of which was larger than the sum of the premiums he would have paid had he kept his policies in force until he died. The questions presented are:

1. Whether the National Service Life Insurance Act requires that the dividends, when declared, be retroactively applied to revive the veteran's lapsed policies even though the regulations of the Veterans' Administrator specifically provide that such dividends shall be paid in cash only.

2. Whether, because of the failure of the Administrator to declare dividends during the veteran's lifetime, the United States is now estopped to deny that the veteran's policies were in effect at the time of his death.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of Sections 602(f), 605(a) and 608 of the National Service Life Insurance Act (54 Stat. 1008, 38 U.S.C. §§ 802(f), 805(a), 808) and of the Regulations of the Veterans Administration (38 C.F.R. (1949) § 8.26, 38 C.F.R. (1949 Supp.) § 8.26a) are set forth in the Appendix, *infra,* pp. 12-15.

STATEMENT

Petitioner is the sister of a deceased veteran, Eugene Morse, who, while serving in the Armed Forces of the United States, took out two certificates of level premium term National Service Life Insurance, each for $5,000, naming her as beneficiary (R. 3, 4, 9). The veteran was honorably discharged on December 7, 1945, and died on August 27, 1948, having failed to pay the premiums on the insurance after March 31, 1947—a period of about 17 months (R. 11). Petitioner brought this suit to recover the proceeds of those certificates.

It is not disputed that the veteran paid no premiums on the policies after March 31, 1947. Petitioner, in her complaint, sought to avoid the effect of the non-payment of premiums by claiming, first, that the veteran was totally disabled during the period during which premiums were not paid, and that the premiums should, therefore, under the National Service Life Insurance Act,[1] be deemed

[1] The district court found, and the court of appeals agreed, that the complaint wholly failed to state that the veteran had complied with the requirements of the Act itself and of the

to have been waived; and, second, that at the time of his death the veteran was owed by the United States the as yet undetermined amount of dividends subsequently declared on his policies by the Veterans Administration, and that, as a matter of law, the United States was required retroactively to apply those dividends to keep the insurance in effect as long as possible. The United States moved to dismiss the complaint for failure to state a cause of action (R. 2), and the district court granted the motion (R. 18). On appeal, that judgment was affirmed (R. 46).

ARGUMENT

Petitioner must, if she is to recover, overcome the defense that the insured had failed to pay premiums for some seventeen months prior to his death. She seeks, in this Court, to avoid the effect of the nonpayment of premiums on two theories: she first argues that the National Service Life Insurance Act requires that dividends, when declared, must be retroactively applied to keep lapsed policies in effect as long as possible. Her second contention is that when the veteran made his last payment, his policies had a reserve equal to the amount of the unpaid and undeclared dividends, that the United States used that money to pay benefits on other policies and, therefore, that the United States is now estopped from denying

Veterans Administration's regulations governing the waiver of premiums. Petitioner does not urge in this Court that that holding was erroneous.

that the insurance was in effect at the time of the veteran's death. These questions have been raised in lower courts in a number of cases. The decisions of those courts[2] have been unanimously in accord with that reached here, and there is thus no conflict calling for resolution. Moreover, the decision below is in all respects correct.

1. Petitioner's first contention, that the National Service Life Insurance Act requires that the deceased veteran be paid his dividends in the form of extended term insurance to the date of his death, is untenable. The only provisions of the National Service Life Insurance Act which bear on this point are Sections 602(f) and 605(a). The former provides in relevant part:

> * * * Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions *as may be found to be reasonable* and practicable, *may be* provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator. [Italics added.] [3]

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[2] Those decisions are: *Jones* v. *United States* (C.A. 8, decided June 1, 1951); *Ferrara* v. *United States* (D.D.C., decided February 23, 1950); *Hollowell* v. *United States* (E.D. Tex., decided May 6, 1950); *Layson* v. *United States* (M.D. Ga., decided November 29, 1950); *Fitzgerald* v. *United States* (N.D. Ohio, decided March 28, 1951); *Parker* v. *United States* (E.D. Tex., decided November 8, 1950).

[3] Congress has recently amended Section 602(f) of the National Service Life Insurance Act by adding the following:

> *Provided further*, That until and unless the Veterans' Administration has received from the insured a request

The latter provides:

> There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. *Payments from this fund shall be made upon and in accordance with awards by the Administrator.* [Italics added.]

The statute thus expressly intrusts the declaration and payment of dividends and the provision for extended values to the discretion of the Administrator.[4]

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in writing for payment in cash, any dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952. [Public Law 36, 82nd Cong., 1st Sess.]

It is significant that under the statute as amended veterans whose policies have lapsed before a dividend is payable will fare no better than they do under the present statute. Nor was Congress unaware that this amendment would not aid those whose policies had lapsed. A bill, H. R. 3551, was introduced in the 81st Congress which would have amended the statute to bring about the result for which petitioner contends. That bill was never reported out of committee.

[4] The statute also provides, by Section 608, that "The Administrator, subject to the general direction of the President, shall administer, execute and enforce the provisions of this part, shall have power to make such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder."

In exercising that discretion, the Administrator specifically provided that "any special National Service life insurance dividend that may be declared shall be paid in cash only" and that "unpaid special dividends shall not be available to pay premiums" (38 C.F.R. (1949 Supp.), § 8.26a). The insurance contracts were expressly made subject to the regulations of the Administrator and those regulations are entirely within the discretion given him by the statute. 38 C.F.R. (1949) § 8.108. They cannot, therefore, be upset. *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501, 502; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 102-103; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413-414.

That the regulation governing the payment of special dividends was not promulgated until after the veteran's death is not material. At the time of his death no dividends had yet been declared; he then had, at best, an inchoate right to receive dividends when and if declared. Cf. *United States* v. *Huie*, 73 F. 2d 305 (C.A. 5). He cannot, therefore, have expected that those dividends would, when declared, be used to keep his policies alive and the regulation prohibiting the use of the dividend for that purpose cannot be said to have defeated his reasonable expectation.

But, in any event, the regulations in effect at his death (12 F. R. 2129, 38 C.F.R. (1947 Supp.) 10.3426) also provided that—as far as term insur-

ance was concerned—all dividends would be payable in cash only.[5] Only in the case of policies other than term policies could dividends be left on deposit and used to provide extended insurance, and then only at the veteran's request. This veteran did not, of course, make such a request.

2. Petitioner's second contention is that the United States, having failed to pay dividends prior to 1950 and having used the insured's "vested property" to pay benefits on other policies, is now estopped from denying that his insurance was in effect at his death. As pointed out by the court of appeals, there may be some fireside equity in the concept that instead of being distributed in cash, the money should have been used to keep the policies alive as long as possible, but as that

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[5] Section 10.3426 was promulgated March 31, 1947, and provided:

> § 10.3426 *Dividends.* A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force *on a basis other than extended term insurance or level premium term insurance.* Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in §§ 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds. [Italics supplied.]

court further said: "we do not see how that can be made a compulsion upon the government when the regulations under the statute, having the force of law because quite consistent with it, are so obviously based on the contrary principle" (R. 45).

When the insured let his policies lapse he possessed, as we have noted, only an inchoate right to receive dividends when and if they were declared. Cf. *United States* v. *Huie,* 73 F. 2d 305 (C.A. 5). His policies, therefore, had no reserve which could then have been used to buy extended term insurance. Nor is there any indication in the record that the insured would have chosen, if dividends had been declared prior to his death, to use the money received to keep his insurance in force. Indeed, since he let the policies lapse, the opposite inference is natural. We can fairly assume that if, in this case, the amount of dividends had not been sufficient to pay for insurance from the time of lapse to the time of the insured's death, petitioner would regard as a deprivation of property without due process of law any attempt by the Veterans Administration to declare that dividends were to be used to revive lapsed policies and keep them alive as long as possible. Her contention, therefore, must be that the whole risk in cases of this kind is placed on the United States.

Whatever considerations there may be which favor the grant by the United States of a death benefit to the families of deceased veterans, when-

ever and however they die, such a grant is not insurance. Congress chose not to grant death benefits. Instead, it made insurance, up to $10,000 per person, available to all members of the armed forces and gave them the right to keep that insurance in force after discharge. This veteran took out insurance while in service but, after discharge, he let his policies lapse. He did so, as the district court observed, despite "widespread warnings to soldiers, by veterans organizations and other agencies." (R. 12). He must be assumed to have consciously taken the risk of an untimely death. Petitioner's arguments that his insurance must now be retroactively revived, so that she may collect death benefits, are untenable.

The Government's defense is, as the court of appeals stated, "complete and unanswerable." (R. 42). No useful purpose would be served by a review, in this Court, of the decision below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1951.

APPENDIX

1. Sections 602(f), 605(a) and 608 of the National Service Life Insurance Act (54 Stat. 1008, 38 U. S. C. §§ 802(f), 805(a), 808) provide as follows:

> SEC. 602 (f) Such insurance shall be issued upon the five year level premium term plan, with the privilege of conversion as of the date when any premium becomes or has become due, or exchange as of the date of the original policy, upon payment of the difference in reserve, at any time after such policy has been in effect for one year and within the five year term period, to policies of insurance upon the following plans: Ordinary life, twenty payment life, thirty payment life. All five year level premium term policies shall cease and terminate at the expiration of the five year term period. Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable, may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.
>
> SEC. 605 (a) There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned

thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator.

SEC. 608. The Administrator, subject to the general direction of the President, shall administer, execute and enforce the provisions of this part, shall have power to make such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this part as may be assigned to them by the Administrator. All official acts performed by such officers or employees designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person. Except in the event of suit as provided in section 617 hereof, all decisions rendered by the Administrator under the provisions of this part, or regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by motion or otherwise any such decision.

2. Sections 8.26 and 8.26a of the Regulations of the Veterans Administration (38 C. F. R. (1949)

8.26, 38 C. F. R. (1949 Supp.) 8.26a) provide as follows:

> SEC. 8.26 *Dividends.* A National Service life insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Any such dividends shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in §§ 8.29 (a) and 8.30, respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash

to the person currently entitled to receive payments under the policy.

SEC. 8.26a *Special dividends.* Any special National Service life insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums.

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ADELE WEISS,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

SIDNEY MOSES,
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